

CHAPTER 1

INTRODUCTION

Preamble.- Whereas it is expedient to provide a general Penal Code for India; It is enacted as follows:-

1. Title and extent of operation of the Code:- This Act shall be called the Indian Penal Code, and shall extend to the whole of India except the State of Jammu and Kashmir.

COMMENTS

History: The Indian Penal Code is the Product. Of the work of successive Law Commission constituted by the British during the 19th century. The main milestones in the work towards the preparation of the Code are as under:-

(1) Chapter Act, 1833 under which the first Indian Law Commission was constituted.

(2) Constitution of the First Indian Law Commission (1834):

President-Maculay

Members(Commissioner):

McLeod

Anderson

Millet

(3) Draft Code submitted to the Governor General in Council (14th October, 1837).

(4) Constitution of Second Indian Law Commission (26th April 1845).

(5) Report of the Second Indian Law Commission on the Draft Penal Code (1846 and 1847, i.e. in two parts).

- (6) Draft Code revised and presented to Governor General in Council (1856). Revision was done by Bethune and Peacock (Law Members).
- (7) Passing of the Code (6th October, 1860).

2. Punishment of offences committed within India.- Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which, he shall be guilty within Indian.

COMMENTS

Foreigners: The words ‘every person’ are believed to have made it clear that a foreigner is subject to Indian Penal Code for an act committed within Esop.- *Jilendranath Gohsoh v. Chief Secretary*, Air 1932 Cal 753 : ILR 60 Cal 364, Cf Esop (1836) 7 C & P 456.

Foreign Sovereigns : Foreign Sovereigns are exempt by International Law which (in this respect) is part of national law.- *The parliament Belge*, (1880) 5 P D 197-207.

Territorial Waters : See Proclamation of 30th September, 1867.- P.M. Bakshi, Selective Commentary on the Constitution and Rastya Rama, (1817) 8 B H C Cr CJ 63.

Within India” : Section 2 focuses on operation of the Code —within India (see the last eight words). This limits its territorial operation. But it is to be read with Section 3, 4, 108A, etc. which (directly or indirectly) provided for its extra territorial preparation.

“Every person”: The words ‘every person’ highlight the universal application of the Code to all persons. The expression ‘person’ is defined in Section 11. Section 2 should, however, be read as subject to provisions to the contrary, which may be found in various enactments or sources. Principal examples are:

- (a) The constitution Articles, e.g. Article 361.
- (b) Excepting provisions in the Indian penal Code (e.g. Chapter 4).
- (c) Excepting or limiting provisions in the Code of Criminal Procedure, 1973.
- (d) Excepting provisions in special laws in the nature of protective clauses.

(e) Rules of International Law (see *infra*).

Rules of public International Law: Certain rules of International Law, are regarded as part of the national law also. One such rule is that foreign states and foreign sovereigns are not subject to the jurisdiction of national courts.- The *Parliament Beige*, (1889) 5 PD 197- 207 (Court of Appeals per Lord justice Brett).

In the U.S., the rule was first rendered authoritatively by Chief Justice John Marshall in *The Schooner Exchange v. M.C. Fidon*, (1812) 11 U.S.(7 Crenel)116, 136, 137,143-146.

The Foreign Sovereign Immunities Act, 1976 (U.S.A, 28 U.S.C. Section 1604) provides that — subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in this Act. This expression —foreign state is defined as including an agency or instrumentality of a foreign state. See C. Lewis, *State and Diplomatic Immunity*, 1980.

In India, this rule continues to apply in regard to criminal proceedings. In regard to civil proceedings, it has been slightly modified by Section 86, Code of Civil Procedure, 1908. That Section, while not totally abrogating the immunity conferred by Public International Law, provides that a foreign sovereign can not be sued except with the consent of the Central Government.

3. Punishment of offences committed beyond but which by law may be tried within India.- Any person liable by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

COMMENTS

Scope : The section provides for extra- territorial operation of Indian legislation relating to criminal law, but only if the terms of the section are satisfied. A very important ingredient of the Section is contained in the words. Any person liable by any Indian law....

The Section operates only where an Indian Law specifically provides that an act committed outside India may be dealt with under that law in India.

“Indian Law”: As to the expression —Indian Law —, see *Madhavrao v. State of M.P.*, AIR 1916 SC 198. The Code itself, in Section 4, provides for extra territorial operation of the penal provisions of the Code. For extra territorial application of other, i.e. special laws, the —extent clause (usually contained in the first Section of the special laws) should be consulted. The Child Marriages Restraint Act, 1929 does not contain any provision for its extra territorial application and, therefore, does not apply to marriage outside India.—*Sheikh Haidar v. Sued Issa*, ILR 1939 Nag 241.

At the same time, if the —Indian Law clearly provides for its own extra territorial application then it is immaterial that the act or omission was not punishment in the foreign country.— *Pheroze v. State*, (1964) 2 Cr LJ 533 (Bom).

Application : Section 3, IPC applies only to a person liable by any Indian Law to be tried for an offence committed beyond India. If the Indian Law does not have extraterritorial operation then Section 3 does not apply.— *Sheikh Haidar v. Sued Issa*, ILR 1939 Nag 241.

At the same time if there is in force such law, it is not necessary that the act must be punishable where it was committed.— *Pheroze v. Syed Issa*, ILR 1939 Neg 241.

4. Extension of Code to extra territorial offences.— The provisions of this Code apply also to any offence committed by—

- (1) any citizen of India in any place without and beyond India;
- (2) any person on any ship or aircraft registered in India wherever it may be.

Explanation.— In this Section the word —offence includes every act committed outside India which, if committed in India, would be punishable under this Code.

Illustration

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India at which he may be found.

CHARGE

I, (name is and office of the Magistrate) hereby charge you (name of the accused) as following:—

If in the place without or beyond India:-

That you being the citizen of India on or about theday of.....at with the intention of or with the intention of or with the knowledge that you will hereby commit the offence in(name of place) without or beyond India (specify the place thereby committed the offence(name of the offence) punishable under Section 4,I.P.C and within my cognizance.

And I hereby direct that you be tried on the said charge by the said court.

COMMENTS

Scope: Section 4, IPC defines the extra territorial application of the Code. Procedure for securing surrender is governed by the Extradition Act,1962.- Jugal Kishore More (1969)

3 SCR 320.

Section 4 does not apply where the offender is not a citizen of India.- Central Bank of India Ltd. V. Ram Narain,(1955)1 SCR 697.

Section 4 provides for the extra territorial operation of the Penal Code. Such operation is conditioned by the nationality of the offender- clause(1), or by the place of commission – clause(2). Under clause (1), the place of commission is immaterial provided the offender is an Indian citizen.

Citizenship is governed by the Citizenship Act, 1955.

Under clause(2) what is required is that the ship or aircraft, must be registered in India. Registration of ships is governed by the Merchant Shipping Act, 1958.

Registration of aircraft is governed by the Indian Aircraft Act, 1934.

Illegal arrest: Even if a person is arrested outside India illegally for trial in India , the trial is not vitiated by the illegality of the arrest.-Vinayak D. Saarkar,1920 ILR 35 Bom 225(arrest alleged to be in violation of rules of Public International Law).

Basis of extra territorial jurisdiction: the most fundamental principle of extra- territorial jurisdiction is nationality . As early as the first authoritative commentator on jurisdiction, the

Italian jurist Bartolus, himself a confirmed territoriality, it has been admitted that a state's laws may be applied extraterritorially to its citizens, Individuals or corporations, wherever they may be found. See Bartolus on the conflict of Laws 51 (Beale trans. 1914).

. A much more controversial form of extraterritorial jurisdiction is the so called effects principle. Extraterritorial though it may be in practice, in theory the effects principle is grounded on the principle of territorial jurisdiction. The premise is that a state has jurisdiction over extraterritorial conduct when the conduct has an effect within its territory.

The effects principle received its most notable enunciation in the Lotus case, where the permanent Court of International Justice was asked to decide whether Turkey had violated the principles of international law by asserting criminal jurisdiction over a French officer who had been navigating a private French vessel, when it collided with, and sank, a Turkish ship on the high seas.

Lotus case: The issue was one of extra territoriality because the Frenchman had at all times during the collision been on French territory, i.e. aboard the French ship, although damage had been inflicted upon Turkish territory, i.e. on the Turkish ship. The Lotus court adopted a strictly positivist view of international law, seeing it as a law entirely generated by the positive acts of states and emanating —from their own free will as expressed in conventions or by usages generally accepted s expressing principles of law.

Lotus case at 18: The permanent Court searched for — a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case and, finding none, ruled that Turkey had not acted improperly either in seizing the French Officer or in trying him for violation Turkey had not acted improperly either in seizing the French Officer or in trying him for violation Turkish law while outside Turkish territory.

Lotus case at 33 : besides nationality and effects, there have been suggested and accepted from time to time a variety of other foundations for a state's exercise of extraterritorial jurisdiction. Three points should be mentioned here: the protective principle, the universality principle, and the passive personality principle. The protective principle provides that a state has jurisdiction to prescribe law with respect to —certain conduct outside its territory by persons not

its nationals which is directed against the security of the state or a limited class of other state interests. Restatement(revised) supra note 8,402 (3).

5. **Certain laws not to be affected by this Act.-** Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airman in the service of the Government of India or the provisions of any special or local law.

COMMENTS

Scope: Section 5 makes it clear that the Indian Penal Code is not exhaustive of the entire criminal law of the country.- Motilal Shah, 1930 ILR 55 Bom 89.

But Section 26 of General Clauses Act, 1897 and article 20 of the Constitution prohibit double punishment for the same offence.

Section 5 saves the operation of two categories of laws, namely:-

- (i) enactments relating to armed forces, and
- (ii) special and local laws.

Armed forces : As to the category (i) mentioned above see the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957.

Special and local laws: As to the category (ii) mentioned above see the expressions —Special law and Local law : as defined in sections 41-42 of the Indian Penal Code.

Double Jeopardy: Although the operation of certain other laws is saved by Section 5 of the Penal Code, it is to be remembered that a person cannot be punished twice for the same offence. See-

- (i) Section 71, second Para, Indian Penal Code.
- (ii) Section 26, General Clauses Act, 1897.
- (iii) Article 20, Constitution of India.